



November 1, 2005

Mr. Joe Desmond, Chairman
Mr. James Boyd, Commissioner
Mr. John Geesman, Commissioner
Ms. Jackalyne Pfannenstiel, Commissioner
Dr. Arthur Rosenfeld, Commissioner
California Energy Commission
1516 Ninth Street
Sacramento, CA 95814-5512

**Re: Petition to Amend Condition of Certification BIO-1 for El Segundo Power
Redevelopment Project (00-AFC-014C)**

Dear Chairman Desmond and Commissioners:

By its petition of September 30, 2005, El Segundo Power II LLC (ESP) has engaged the Energy Commission in a high-stakes game of “chicken” in an attempt to weaken Condition of Certification BIO-1 of its current license. Santa Monica Baykeeper and Heal the Bay (“Environmental Intervenors”), Intervenors in the certification proceedings for the El Segundo Power Redevelopment Project (00-AFC-014), urge the Commission to (1) deny the project owner’s petition; (2) investigate the allegations described below concerning noncompliance and conflicting representations; and modify or revoke ESP’s certificate as appropriate. The ESP petition brings up several important issues, chief among them:

- If alteration of the funding schedule was required for the project to continue forward, why did the project proponent not petition the California Supreme Court for redress?
- Why has ESP ignored the Commission’s deadline for the first payment to the Santa Monica Bay Restoration Commission, instead submitting the current petition on the last day the payment was to be due? The Commission had made clear that the validity of the certificate is predicated on “the timely performance of the Conditions of Certification and Compliance Verifications enumerated in the accompanying text. The Conditions and Compliance Verifications are integrated with this Decision and are not severable therefrom.” (See Order on Reconsideration, January 14, 2005)
- Why has ESP not consulted with the entities designated in the verification provisions of condition BIO-4 as to its 316(b) study design?
- Why do representations made by ESP during the certification proceedings as to the design of the cooling system, volume of cooling water used, and reasons for the use of those volumes vary substantially from information stated by ESP to the Los Angeles Regional Water Quality Control Board (“Regional Board”) over the past year?

1. The Commission Should Deny the Petition

A. Commission Regulations Prevent Approval of the Petition

The Energy Commission's regulations at title 20, sec. 1769 allow the Commission to approve such a petition only when the project (1) would remain in compliance with all applicable laws, ordinances, and regulations (LORs), and standards subject to Pub. Res. Code sec. 25525; (2) would benefit the public, applicant, or intervenors; *and* (3) there has been a substantial change in circumstances post-certification justifying the change. While approval of the petition would benefit the applicant, the requirements as to LORS compliance and a substantial change in circumstances are not met by the petition.

As to LORS compliance, modification of the BIO-1 condition as suggested by ESP will result in further questionable compliance with the California Coastal Act. Comments from the California Coastal Commission docketed in this proceeding succinctly present these concerns.

As to a "substantial change in circumstances" none such change exists. On October 17, 2005, the Energy Commission Staff issued an analysis of the project owner's petition, and concluded that there has been no substantial change in circumstances since certification of the project on February 2, 2005. Santa Monica Baykeeper and Heal the Bay supports Staff's analysis and conclusion on this issue. ESP lacked a power purchase agreement in February of this year and still lacked an agreement on the date of the petition. Environmental Intervenors also note that the payment of the funds to the SMBRC could have been but were not conditioned on the existence of a power purchase agreement. Thus, circumstances have not changed and the Commission may not approve the petition under the applicable regulations.

Rather than reflecting any change in circumstances, ESP's petition is a thinly veiled attempt to have the Commission reconsider its original decision. ESP is using the petition process as a forum to reargue its original positions. (See, *e.g.*, Petition at 6.) Provisions under Public Resources Code section 25530 are the only mode for this recourse, and as the Commission showed earlier this year concerning this very project, these procedures are construed very narrowly. Not only does ESP seek to have the Commission reconsider its decision, but ESP stealthily attempts to shift the burden to the Commission to explain why its decision was appropriate. (Petition at 1 ["The adopted payment schedule language regarding timing appeared unexpectedly, and with little or no explanation...it lacks reason to be connected to project approval"].)

B. Approval of the Petition Is Not Prudent

While Environmental Intervenors continue to believe that the current license does not comport with law, we certainly do not believe that weakening a fundamental tenet of the license can achieve that objective either. Regardless of law, BIO-1 reflects the concerted attempts by the Commission to balance energy production and environmental protection. Approval of ESP's petition would upset this balance. Environmental Intervenors believe that the Commission took extraordinary measures to satisfy the project owner in these proceedings, and that the September 30 petition represents unacceptable gamesmanship.

Moreover, ESP is more than capable of making the payment. ESP is owned by West Coast Power LLC, a venture of NRG Energy, Inc. ("NRG," based in New Jersey) and Dynegy, Inc (based in Houston, Texas). While ESP insists that it lacks \$250,000 to make the first payment to the SMBRC on time, recent news and mandated financial filings offer dramatic evidence to the contrary. For example, according to its second quarter earnings statement, Dynegy possessed \$358 million in cash on hand on June 30, 2005. (Available at <http://www.shareholder.com/dynegy/ReleaseDetail.cfm?ReleaseID=170473>) Earlier in the year, Dynegy announced the sale of its midstream natural gas business for \$2.475 billion in cash. (Available at <http://www.shareholder.com/dynegy/ReleaseDetail.cfm?ReleaseID=170194>) NRG Energy, Inc. is also financially sound. On August 9, 2005 NRG announced a \$250 million stock buyback plan using existing cash reserves, and as of June 30, 2005 reported \$493 million in unrestricted domestic cash reserves. (Available at <http://www.snl.com/irweblinkx/file.aspx?IID=4057436&FID=1894134>) Thus, independent and easily available research contradicts ESP's claims, and provides additional support for denying the current petition.

2. *The Project Owner's Differing Representations and Unclean Hands Warrant Further Action by the Commission*

The allegations below militate for reopening the proceedings, investigating the charges, and modifying or revoking ESP's certificate as appropriate. Public Resources Code section 25534 allows the Commission, after one or more hearings, to amend the conditions of, or revoke ESP's certification because of (1) material false statements (Pub. Res. Code §25534(a)(1)) made in the proceedings, (2) any significant failure to comply with the terms and conditions of approval of the application (Pub. Res. Code §25534(a)(2)), or (3) certain other circumstances not relevant here. Environmental Intervenors believe not only that material false statements were made in the proceedings, but also that ESP has failed to comply with the decision thus far in two significant ways.

A. *The Project Owner Failed to Meet the Deadline for the First Payment under BIO-1*

As the Staff's analysis indicates, the same day that ESP submitted their petition was also the deadline for making the first of four \$250,000 payments to the SMBRC. There is no excuse for, and no legal authority to support, unilaterally ignoring this condition imposed by the Commission. At a minimum, the Commission should require that:

- funds are transferred immediately with interest to the SMBRC; and
- future payments are made per the schedule currently in place.

ESP should also be penalized for ignoring the Commission. Rather than administrative civil penalties (which are applicable in the instant manner), Environmental Intervenors suggest that the \$4 million remaining after the initial four payments be due and payable 90 days after the fourth payment (approximately September 30, 2006). The Commission should further remove the condition that allows ESP to petition for the return of any unspent funds upon beginning of

commercial operation. In addition, the Commission should require a mandatory administrative civil penalty should ESP fail to make future payments on time.

The Commission should take this opportunity to provide clarity regarding a component of BIO-1 that ESP finds perplexing. ESP asserts that the \$5 million "is not fixed but rather such payments are subject to an upper limit of \$5,000,000." (Petition at 4.) The plain meaning of the BIO-1 condition is that the \$5 million figure is fixed, and that it is only by leave of this Commission that any unspent funds will be returned. As stated above, we believe this latter condition should be removed in light of ESP's noncompliance.

B. The Project Owner Has Failed to Consult as Required By BIO-4

In addition to violation of BIO-1, ESP has also violated condition BIO-4. In its verification provisions, BIO-4 requires that the "[p]roject owner shall consult with the LARWQCB, the Coastal Commission, Energy Commission staff, Santa Monica Bay Restoration Commission, and the Santa Monica Bay Keepers to develop the appropriate design for any 316(b) study." Thus far, the project owner has failed to consult with Santa Monica Baykeeper on its 316(b) study design. We are unsure whether the project owner has consulted with the other parties (other than the LARWQCB) specified in BIO-4's verification provision. The Commission should direct Staff to refashion these verification provisions under this condition as permitted by title 20, section 1770 of the California Code of Regulations to ensure appropriate consultation.

C. The Project Owner Has Represented the Plant's Cooling System, Volumes of Cooling Water, and Reasons for the Use of Cooling Water Differently to the Energy Commission and the Los Angeles Regional Water Quality Control Board

Last fall, the Regional Board began to process ESP's application for a renewed NPDES permit under Clean Water Act section 316. In November 2004, the Regional Board sent ESP a letter requesting an explanation for the use of water through intake 001 in light of the lapsing of air permits for Units One and Two. ESP responded in January 2005 by providing daily flow data for the period 1998-2004, but did not provide adequate explanation for its water usage. The Regional Board inquired again in a second letter in February 2005. ESP's second reply disclosed the existence of a "cross over" between the two sets of generating units. In this response, ESP portrayed the cross over as a critical component of the plant. The Regional Board is now investigating the existence of the cross over and evaluating the plant's use of cooling water during the permit period to the present.

ESP's statements to the Regional Board call into question the certification proceedings here at the Commission on at least three fronts.

1. First, the Commission should determine whether the applicant accurately described the design of the plant. Environmental Intervenors believe that the May 2005 letter was the first mention of the "cross over," whether in statements before the Energy Commission or in historical NPDES permit

applications. As all parties to the proceedings can recall, the cooling system and the quantity of ocean water used were primary sources of controversy during the proceeding. It is obvious that accurate description of a project is fundamental to transparency and informed decisions concerning California's resources; ESP and future applicants coming before the Commission need to understand this.

2. Second, the Commission should assess whether the project proponent accurately represented historical flow volumes. The fundamental effect of these new data could be that the plant's actual impacts are significantly greater than previously stated. If volumes were not characterized accurately, the Commission's analysis as to the baseline and CEQA analysis may be flawed, in addition to the Coastal Act analysis. Moreover, if the project proponent has been out of compliance with its NPDES permit, the Commission may need to revisit its analysis of the project's compliance with LORS, as the Commission relied on current NPDES compliance in its final decision. (See Final Decision at 46.)
3. Finally, the Commission should analyze whether ESP accurately described the need for 50 million gallons of seawater per day for maintenance of intake 001, in light of historical data submitted to the Regional Board showing far less than this amount appears to have been necessary at the power plant.

For the foregoing reasons, Environmental Intervenors urge the Commission to deny ESP's petition. The Commission should require ESP to immediately submit the first scheduled payment, with interest, to the SMBRC. The Commission should maintain the remaining payment schedule as it currently stands, and should require the payment of the remaining \$4 million 90 days after the fourth payment of \$250,000. The Commission should also direct Staff to modify the verification provisions in the certificate to ensure that ESP begins to effectively comply with the requirements of the decision. At the same time, the Commission should reopen the certification proceedings, investigate the claims made in this letter and the recent letter from the Coastal Commission, assign the matter for further hearing, and then modify or revoke the certificate as appropriate. Thank you for this opportunity to comment.

Sincerely,

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Santa Monica Baykeeper

Heather Hoecherl, Esq.
Science and Policy Director
Heal the Bay

cc: Mr. Marc Pryor, Compliance Project Manager (via email)
Energy Commission Service List for 00-AFC-14 (via email)
L.A. Regional Water Quality Control Board: Mr. David Hung, Dr. Tony Rizk (via email)